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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 CRECITA WILLIAMS, as Proposed Administrator
4 for the Estate of Roberto Grant,
5 NICOLE MORRISON, as Administrator for
the Estate of Roberto Grant, and
6 NICOLE MORRISON, as Mother and Legal
Guardian for the Property of AG and SG,
Decedent's Minor Children,

Plaintiffs

V.

7 UNITED STATES OF AMERICA, FEDERAL
BUREAU OF PRISONS, CORRECTION OFFICER
8 KERN, EXECUTIVE ASSISTANT LEE
PLOURDE, and JOHN AND JANE DOE(S)
9 AGENTS, SERVANTS AND EMPLOYEES OF
Defendants

17 Civ. 6779 (WHP)
Oral Argument

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New York, N.Y.
July 9, 2019
11:00 a.m.

12 Before:

13 HON. WILLIAM H. PAULEY III

14 District Judge

15 APPEARANCES

16 LAW OFFICE OF ANDREW C. LAUFER
17 Attorney for Plaintiff
ANDREW C. LAUFER

18 UNITED STATES ATTORNEY'S OFFICE
19 SOUTHERN DISTRICT OF NEW YORK
Attorney for Defendants
20 JENNIFER C. SIMON

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(In open court; case called)

DEPUTY CLERK: Appearances?

MR. LAUFER: Andrew Laufer, 255 West 36 Street, Suite 1104, New York, New York, 10008. For the plaintiff, your Honor.

Good morning.

THE COURT: Good morning.

MS. SIMON: Jennifer Simon from the U.S. Attorney's Office on behalf of the federal defendants.

THE COURT: Good morning, Ms. Simon.

This is oral argument on the defendant's motion. Do you want to be heard?

MS. SIMON: Yes, your Honor.

THE COURT: All right.

MS. SIMON: As your Honor is aware, plaintiff alleges in her amended complaint that Mr. Grant died of blunt force trauma while he was in a multi-inmate cell at MCC. Recognizing that tragedy of Mr. Grant's death, particularly given his young age and whatever the cause of the death, however, does not alter the fact that the amended complaint contains no factual allegations of any negligence by the defendants that could have caused Mr. Grant's death, nor does the amended complaint identify the violation of any constitutional right by Mr. Plourde or Officer Kearins that would support a *Bivens* claim.

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1 If I could, your Honor, I would just like to highlight
2 some of the flaws in the *Bivens* claims in particular to begin
3 with.

4 With respect to Mr. Plourde, it appears in the amended
5 complaint, and to some extent in the opposition, that
6 plaintiffs are attempting to assert a violation of the Eighth
7 Amendment. Here, however, there is no allegation in the
8 amended complaint or anywhere else that Mr. Plourde was
9 deliberately indifferent to any of Mr. Grant's medical needs.
10 There is no allegation that would support a plausible inference
11 that he intentionally denied or delayed access to medical care
12 to Mr. Grant, which is a fundamental requirement of any Eighth
13 Amendment *Bivens* claim.

14 Similarly, with respect to the allegations of a
15 coverup, even if a coverup implicated some constitutional
16 right -- which none is identified and I can think of none --
17 there is no factual allegation that would support a plausible
18 inference that Mr. Plourde himself was personally involved in
19 such a coverup. In fact, what the amended complaint simply
20 says is that the morning after Mr. Grant's death, Mr. Plourde
21 advised plaintiff that he died of a drug overdose and that that
22 statement was untrue. There is no allegation Mr. Plourde
23 himself knew the statement itself to be false or was involved
24 in any conspiracy personally.

25 In her opposition brief, plaintiff adds the theory

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1 that it actually amounted to a deprivation of a property
2 interest. Again, under *Abbasi*, there's no basis to expand the
3 *Bivens* remedy to this wholly new context as we set forth in our
4 brief.

5 Even assuming that that constitutional right did
6 suffice for a *Bivens* claim, however, there is no factual
7 allegations of any deprivation of property interest here. In
8 fact, when looking at *Barrett* in which a plaintiff was deprived
9 of an FTCA claim, and then some 20 years later learned of the
10 conspiracy, learned that she had settled this FTCA claim for a
11 nominal amount compared to what she would have had she known
12 the truth of the death, here plaintiff herself has asserted an
13 FTCA claim and did so since the beginning of this lawsuit.
14 There is no allegation that any deprivation happened here and
15 in the way that *Barrett* contemplated.

16 As to Officer Kerns, again, with the Eighth Amendment
17 claim, similarly to Mr. Plourde, there's no allegation that he
18 was deliberately indifferent to his medical needs. There's no
19 allegation that he intentionally denied or delayed medical
20 care. And, again, both Officer Kearins and Mr. Plourde are
21 non-medical personnel. So that is what would need to be
22 alleged to assert an Eighth Amendment violation here.

23 THE COURT: What about the allegations that he
24 harassed Grant?

25 MS. SIMON: With respect to those claims, it appears

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1 that plaintiff is attempting to assert some sort of excessive
2 force claim. Not only does the government not concede that
3 that is a *Bivens* claim, particularly after *Abbasi*, there's no
4 allegation that he actually used any force, and the mere threat
5 of force -- even assuming that's true, which defendants do not
6 concede -- doesn't amount to excessive force. And the sort of
7 vagueness of that allegation isn't even connected in any way to
8 Mr. Grant's death. There is no allegation that he was involved
9 in any way in whatever the cause of Mr. Grant's death was. In
10 fact, what the amended complaint alleges is that unidentified
11 assailants beat up Mr. Grant.

12 With respect to the FTCA claim, certainly the
13 allegations as a whole are enormously conclusory, and there's
14 no factual allegations from which you could draw an inference
15 of negligence on the part of any defendant. On the contrary,
16 they are the sort of what the Supreme Court refers to as
17 unadorned, the-defendant-harmed-me type of allegations that are
18 insufficient to state a claim of negligence.

19 THE COURT: An individual who is in the custody and
20 care of the Bureau of Prisons was beaten to death in a
21 dormitory. How can you say that there aren't sufficient
22 allegations of negligence? Weren't there cameras in the
23 dormitory?

24 MS. SIMON: No, your Honor. Our understanding is that
25 because it was where the bunks were, there were no cameras in

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1 there.

2 And with respect to your Honor's question about --
3 even assuming plaintiff's allegations about the manner in which
4 Mr. Grant died are true, an allegation of negligence would
5 still require that the government either foresaw this harm and
6 failed to prevent it or did not respond in a --

7 THE COURT: I read the autopsy report. He was beaten
8 to death in a dormitory that people are supposed to be
9 supervising. Right?

10 MS. SIMON: I think with respect to the supervision
11 claim, however, it is up to the discretion of the prison, and
12 the discretionary function would apply here, to determine the
13 manner in which they're supervised. And it appears that
14 whatever happened to Mr. Grant, it happened very quickly.
15 Officers responded very quickly. There's no allegation in the
16 amended complaint that there was a delay in the responsiveness
17 of the correctional officers or in any way that they foresaw
18 that this was about to happen.

19 THE COURT: How would they be in a position to know?
20 How would the plaintiff be in a position to know? Because
21 Mr. Grant is deceased and the one prison official who spoke to
22 Mr. Grant's relatives said he died of a drug overdose.

23 MS. SIMON: So, as your Honor instructed, we've
24 responded at this point to plaintiff's document requests. We
25 have provided all of the responsive records from BOP that

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1 plaintiff requested in her discovery requests, and those
2 included the medical records of Mr. Grant, notes from the
3 interviews of the inmates who were present, as well as notes
4 from the interviews of the correctional officers who responded
5 when Mr. Grant fell unconscious. It also included incident
6 reports and so forth.

7 So, to the extent that plaintiff has a fulsome view of
8 what happened, she is now aware of BOP's conclusions with
9 respect to the investigation.

10 There isn't an indication either, in our view, in
11 those records or in plaintiff's allegations in the amended
12 complaint, that there was any negligence earth through a delay
13 or through some failure to protect him from a foreseeable harm,
14 any indication of negligence on the part of defendants.

15 Moreover, to the --

16 THE COURT: Couldn't plaintiff's allegations fairly be
17 read to suggest that someone at MCC was negligent in enforcing
18 security policies?

19 MS. SIMON: And that itself would be subject to the
20 discretionary function. So, to the extent that plaintiff's
21 allegations is that somebody was harmed in the care of MCC and
22 that therefore somebody must have done something wrong, or
23 there must be some misconduct, that is not only insufficient to
24 state a claim, but the claim about the oversight and
25 supervision of the prison without some more specificity as to

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1 the act or omission alleged is subject to the discretionary
2 function exception.

3 THE COURT: But that's the enforcement of the
4 policies. I mean, this is not someone who slipped and fell.

5 MS. SIMON: As far as the enforcement, there isn't --
6 and now that plaintiff has the discovery, there isn't an
7 allegation anywhere here that there was some specific act or
8 omission that the government or one of its agents could have
9 done differently, and that at the heart of it is what is needed
10 to plead a negligence claim. There must be a failure of a duty
11 to protect, and the duty here is to protect him from
12 foreseeable harms. There is no allegation or an indication
13 anywhere here that whatever befell Mr. Grant was foreseeable
14 and that the government either failed to protect or failed to
15 respond quickly once being aware of his condition.

16 As to any argument, for example, that there should
17 have been cameras in the residence, there are reasons, as I
18 understand it, why there might not be cameras on the bunks of
19 the inmates for privacy concerns or whatever it is, but any
20 allegation that the negligence was the failure to install a
21 camera such that every inmate was under observation 24/7 is
22 plainly within the discretionary function exception. And there
23 is simply no allegation in the amended complaint or elsewhere
24 that identifies any act or omission or any negligence by any of
25 the defendants.

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1 Also, to sort of emphasize the difference between the
2 allegations in the amended complaint here, as compared to those
3 in *Coulthurst* or *Triestman* even where you have an allegation in
4 *Triestman* there was a failure to inspect gym equipment that led
5 to the harm. In *Coulthurst* there's a failure alleged to
6 provide signaling devices in unlocked cells, things of that
7 nature. There is a specific act or omission alleged from which
8 a plausible inference could be drawn there was sort of a
9 negligent or a lazy guard, to use the language of *Triestman*.
10 Here, there is no alleged act or omission from which that can
11 be inferred.

12 And, relatedly, the FTCA only permits -- as your Honor
13 is aware, only permits claims to proceed to the extent that
14 they are available under New York State law, and New York State
15 law, in particular with respect to the duty of care, emphasizes
16 that it must be a foreseeable harm, and plaintiff herself
17 concedes this in her opposition brief that it must include an
18 act or omission of failure to protect the defendant or
19 Mr. Grant from a foreseeable harm. That is simply not alleged
20 here.

21 And for the same reasons, the negligent hiring and
22 supervision aspect of plaintiff's FTCA is similarly barred by
23 sovereign immunity. In other words, it's plain under New York
24 State law that under such circumstances as these, those claims
25 cannot proceed.

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1 If your Honor has no further questions, we will rely
2 on our papers.

3 THE COURT: Thank you.

4 MS. SIMON: Thank you.

5 THE COURT: Counsel.

6 MR. LAUFER: Yes, your Honor.

7 Your Honor, I really don't know what to say in terms
8 of what type of duty BOP thinks they do owe to prisoners after
9 what I just heard.

10 Their mandate is safekeeping care and subsistence of
11 prisoners under their care. 18 U.S.C. 4042(a). That would
12 infer, your Honor, oversight, security, things of that nature,
13 to ensure reasonably that prisoners are safe and free from
14 harm.

15 Here, we don't allege necessarily a specific device or
16 policy or procedure in an attempt to second-guess what they
17 should install or what they should place in everyone's dorm.
18 What we do allege is that these guards and people overseeing
19 these areas of dormitories are already equipped with eyes and
20 ears to oversee what goes on with these prisoners in a maximum
21 security prison where some of the most notorious prisoners are
22 held.

23 My client, and we have Crecita Williams here, her son
24 was a healthy 35-year-old man. As your Honor reviewed in the
25 autopsy report, he was beaten savagely to death. Even

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1 defendants notes and the limited discovery that we received
2 show that he was choked. Now, how long does it take to murder
3 a 35-year-old man, a healthy 35-year-old man, a strong
4 35-year-old man? How long does that take in the middle of the
5 night in his dormitory? Not some unsurveilled aspect of
6 prison; in his dormitory, where he lives, where he keeps his
7 personal items, where he converses with other prisoners. How
8 much force, how much power, how many people does it take to
9 murder someone like that, to choke them to death, to beat them
10 to death? The amount of trauma that my client's son -- who has
11 two twin daughters that he will, unfortunately, not be able to
12 raise -- how much of trauma does it take to murder him? How
13 long does it take? How come no one was there to either hear or
14 see what was going on, when I'm sure he was screaming for his
15 life, when he knew that the odds were stacked against him from
16 his assailants.

17 Now, counsel for the defense says that they acted
18 quickly and appropriately. That was only after they found his
19 deceased form on his bunk the next day, your Honor. He was
20 there for hours. Hours. Before anyone inquired as to his
21 health, safety or welfare.

22 I don't get how the United States Government in this
23 case can say with a straight face that they owed no duty to my
24 client. That is actionable upon its breach. In the FTCA claim
25 counsel says, yes, it is reasonable -- it was reasonably

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1 foreseeable in a maximum security prison; that there's going to
2 be violence there. Was this something that happened quickly
3 under *Sanchez v. State*. That's the standard under New York
4 State law. They don't need to know the specifics of what may
5 happen that there's a beef between two prisoners or that
6 someone's life is in imminent danger. It just needs to be
7 reasonably foreseeable.

8 This type of violence is reasonably foreseeable, your
9 Honor, and it happened over a long course of time. My client's
10 neck wasn't immediately broken. He wasn't killed immediately.
11 It wasn't one strike. There were several strikes, if you
12 review or if you take the time to review or the government
13 takes the time to review the autopsy report.

14 This clearly falls within *Carlson v. Green*, your
15 Honor, lazy guard. I think we can all agree at a minimum there
16 needs to be observation on dormitories where prisoners are
17 staying at night in a maximum security prison in this country.
18 There needs to be eyes and ears at some point, whether it's a
19 patrol or constant surveillance even if they don't have
20 cameras. They need to look. They need to see. They need to
21 assist if the need arises, and here it did clearly, and no one
22 came. No one came to help him. He was paying his debt to
23 society. But that debt did not include being murdered.

24 I don't see how any of these actions that we've
25 enumerated fail the plausibility standard in *Iqbal* or Rule 8 or

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1 any of its progeny, *Twombly*. I think this is a waste of time,
2 this motion. My client still doesn't know who murdered her
3 son. That gets me to the so-called investigation that they
4 claim they did, and the coverup, which is very apparent, that
5 somehow my client died of a synthetic marijuana overdose of
6 K-2.

7 How would Mr. Plourde know this? Who did he hear it
8 from? It might be a few questions I'd have to ask him at
9 deposition. Why were they pushing this theory that he died
10 from some sort of heart attack secondary to drug overdose?
11 I'll tell you why. Because this frees them of liability for
12 his life.

13 Now, I would imagine -- and this argument is just
14 false and ridiculous. I would imagine that death would be
15 problematic for a body to process any type of illicit substance
16 out of. It would remain within the system after death. And a
17 review of the autopsy report shows that no illicit drugs or
18 anything of that nature was found in his system. I don't know
19 how they can run with this type of defense, Judge. I don't
20 know how they can't seek to resolve this matter with my
21 clients. Yet, instead, they litigate this case for years and
22 keep us going through discovery, denying any type of
23 responsibility.

24 To date my client still does not know who murdered her
25 son, who would have gotten out of jail, who would have been

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1 able to help raise his daughters with his ex-wife, who are now
2 turning seven and will no longer have a parental guidance and
3 emotional support of their father.

4 I just don't know what more we would need to say.

5 THE COURT: What exactly are the grounds for your
6 *Bivens* claim?

7 MR. LAUFER: Well, with regard to Mr. Plourde, Eighth
8 Amendment, your Honor, to say it clearly. There is clear case
9 law which supports an Eighth Amendment violation for the death
10 of an inmate in their individual capacity. That's *Carlson v.*
11 *Green*.

12 THE COURT: Is that deliberate indifference to serious
13 medical needs? What's the theory?

14 MR. LAUFER: It would be Eighth Amendment -- I mean,
15 they inflicted the need for -- someone inflicted the need
16 for -- as a result of their negligence, and maybe they heard
17 him scream, maybe they heard him yelling for help, and they
18 just ignored it. We don't know yet because we haven't deposed
19 anyone yet.

20 But what we do know is that we believe Mr. Plourde
21 furthered a conspiracy by lying to my clients, and Officer
22 Kearins had serious issues with my client, consistently
23 accusing him of engaging in use of K-2, the use of illegal
24 drugs, and that my client, the decedent, Mr. Grant, spoke
25 specifically to both his mother and his ex-wife that this guard

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1 was threatening him, was threatening his physical safety and
2 potentially his life.

3 Again, this is a motion to dismiss. We need to meet a
4 plausibility standard, and I think we can further flesh or
5 flush this issue out with depositions of her discovery defense.

6 THE COURT: Anything further?

7 MR. LAUFER: No, your Honor.

8 THE COURT: Ms. Simon, anything further?

9 MS. SIMON: Briefly, your Honor, a couple of points.

10 Recognizing that at this stage we are obliged to
11 accept the facts as pled in the amended complaint, I do feel
12 compelled to note that defendants in no way concede plaintiff's
13 counsel's representation of the facts, and in fact based on the
14 documents that were provided and established in interviews and
15 the medical records establish a very different timeline than
16 the one plaintiff's counsel outlined here.

17 But, in any event, relying on the allegations in the
18 amended complaint which are at issue in the motion to dismiss,
19 certainly there is no allegation of any of the type of
20 negligence that would suffice to state a claim against the
21 defendants. And the Court should look to the allegations there
22 and not those augmented either here by plaintiff's counsel or
23 anywhere else.

24 With respect to your Honor's questions on the *Bivens*
25 claims against Mr. Plourde and Officer Kearins, again, any

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1 allegation that Mr. Plourde -- I might be misstating how
2 plaintiff's counsel framed this but -- inflicted the need for
3 medical care is not only fully and adequate to state a *Bivens*
4 claim, but is also not in any way alleged in the amended
5 complaint. And with respect to Officer Kearins, again, the
6 allegation that Officer Kearins had issues with Mr. Grant or
7 accused him of using K-2 or threatening his physical safety,
8 for the reasons we stated previously, are simply insufficient
9 to state a *Bivens* claim.

10 Thank you, your Honor, unless you have further
11 questions

12 THE COURT: Thank you for your arguments.

13 Decision on the motion is reserved.

14 Have a good afternoon.

15 (Adjourned)